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No. 89-430

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS NOONS AND PHILIP NOONS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly issued a writ of mandamus to vacate the district court's order that compelled a government witness to submit to a sealed ex parte deposition by defense counsel before trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 878 F.2d 153. The district court's order (Pet. App. 15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1989. A petition for rehearing was denied on July 12, 1989. Pet. App. 13a. The petition for a writ of certiorari was filed on September 11, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were indicted in the Southern District of Texas on several charges. One count charged petitioners with conspiracy in violation of 18 U.S.C. 371. The objects of the conspiracy were: (1) to defraud the United States; (2) to embezzle and misapply assets of a federally insured savings and loan institution in receivership; and (3) to make false statements to the Federal Savings and Loan Insurance Corporation (FSLIC). Petitioners were also charged with embezzling and misapplying assets of a federally insured savings and loan institution in receivership, in violation of 18 U.S.C. 657, and making a false statement to the FSLIC, in violation of 18 U.S.C. 1001. Pet. App. 2a; Gov't C.A. Pet. 2.[1]

As alleged in the indictment, the FSLIC, as the insurer of deposits, closed the Mainland Savings Association in April 1986. The FSLIC acted as receiver for the Houston bank from May 1986 through August 1988. During that period, petitioner Philip Noons worked as an asset manager for the FSLIC; Noons had worked for Mainland until the bank fell into receivership. Pet. App. 2a; Gov't C.A. Pet. 12-13.

The indictment alleged that Philip Noons and his brother, petitioner Thomas Noons, conspired to defraud the FSLIC, as Mainland's receiver, by causing it to sell at less than fair market value one of Mainland's assets to an entity controlled by C. Marshall

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[1] Petitioner Philip Noons was charged with two additional counts of embezzling and misapplying assets of a federally insured savings and loan institution in receivership, in violation of 18 U.S.C. 657. Gov't C.A. Pet. 2.

Rea, an attorney.[2] Petitioners secretly gave Rea's firm some of the funds that were used to purchase that note; Philip Noons misrepresented the note's value to the FLSIC officials who were responsible for the sale. From the time of the sale, in March 1988, and through February 1989, petitioners used Rea as a conduit by which they received some of the collections on the note. Pet. App. 2a; Gov't C.A. Pet. 14-18.[3]

2. On April 3, 1989, petitioners filed a pretrial motion to dismiss the indictment or to suppress evidence. Petitioners alleged that Rea was their attorney and that the government, with Rea's consent, had recorded conversations between Rea and petitioners. Petitioners therefore claimed that the recordings and the disclosures to the government of these conversations amounted to a breach of the attorney-client privilege and violated the Fifth and Sixth Amendments. Pet. App. 3a, 56a-60a. The government opposed that motion contending that the recorded conversations were not privileged because Rea in fact had not served as petitioners' attorney and because those conversations "were for the purpose of furthering an intended, present, or continuing illegality." *Id.* at 3a; see *id.* at 61a-67a.[4]

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[2] The asset was a $4 million installment note executed in December 1982. The note required the debtor to make monthly payments of approximately $37,000, with an approximate $3.9 million balloon payment due in January 1993. The debtor assigned the note to Mainland in December 1984. Pet. App. 2a; Gov't C.A. Pet. 14.

[3] The additional charges against Philip Noons, see note 1, *supra*, involved the sale of another Mainland asset to an entity controlled by Rea. Gov't C.A. Pet. 19-21.

[4] That motion remains pending before the district court. Pet. App. 5a.

In the meantime, petitioners filed a motion on April 11, 1989, to take Rea's deposition "*ex parte* and under seal for the purpose of questioning him regarding his relationship with ~~the~~ [petitioners], what he told the government about ~~the~~ [petitioners], and 'all matters pertinent to this case.'" Pet. App. 4a; see *id.* at 68a-71a. The government opposed that motion. The government contended that Rule 15 of the Federal Rules of Criminal Procedure does not authorize discovery depositions, that petitioners had not suggested that Rea would be unavailable either for trial or for any pretrial hearings, and that Rule 15 does not permit ex parte depositions under any circumstances. *Id.* at 4a; see *id.* at 73a-75a.

3. After a hearing, see Pet. App. 16a-28a, the district court on May 3, 1989, granted petitioners' discovery motion. The court's order "compelled [Rea] to testify under oath without the government present for the limited purpose of discovery." *Id.* at 15a. That order further provided that "the deposition shall remain sealed until further order of this court." *Ibid.* The court later scheduled the deposition for May 11. *Id.* at 5a.

Rea filed a motion to quash that order. Pet. App. 85a-90a. After another hearing, the district court denied the motion on May 10, 1989. *Id.* at 51a. The government sought a stay of the court's order in the court of appeals and filed a petition for a writ of mandamus to vacate that order. The court of appeals stayed the proceedings pending its consideration of the government's petition. *Id.* at 1a-2a.

4. The court of appeals granted the government's petition and issued a writ of mandamus barring the taking of Rea's sealed ex parte deposition before trial. Pet. App. 1a-12a. The court first concluded that the

Federal Rules of Criminal Procedure do not authorize such depositions. Rule 15(a), by its terms, permits depositions to be taken only so that testimony may be "preserved for use at trial." Fed. R. Crim. P. 15(a). The court pointed out that "there was no claim, evidence, or finding that Rea might be unavailable to testify at trial or at any pretrial hearing." Pet. App. 7a. To the contrary, the district court "expressly ordered that the deposition was 'for the limited purpose of discovery,' " a purpose that the court of appeals held to be impermissible under Rule 15. *Id.* at 6a-7a.[5] Turning to Rule 16, the court similarly held that that Rule "affords no basis for a discovery deposition" since the Rule "does not mention depositions." *Id.* at 6a-7a.

The court of appeals next acknowledged that "in certain limited circumstances the district court in a criminal case may order discovery not provided for by statute or the Federal Rules of Criminal Procedure." Pet. App. 7a. The court, however, distinguished this case from *United States* v. *Carrigan*, 804 F.2d 599 (10th Cir. 1986). In that case, the Tenth Circuit refused to vacate the district court's order for the discovery deposition of two government witnesses where the record supported the trial court's factual finding that the government had interfered with the witnesses' freedom to talk with defense counsel. *Id.* at 604. Here, by contrast, the court of ap-

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[5] The court noted that other circuits had reached the same conclusion. See, *e.g.*, *United States* v. *Troutman*, 814 F.2d 1428, 1453 (10th Cir. 1987); *United States* v. *Cutler*, 806 F.2d 933, 936 (9th Cir. 1986); *United States* v. *Hutchings*, 751 F.2d 230, 236 (8th Cir. 1984), cert. denied, 474 U.S. 829 (1985); *United States* v. *Steele*, 685 F.2d 793, 809 (3d Cir.), cert. denied, 459 U.S. 908 (1982).

peals observed that "there is no allegation, no finding, and no evidence that the government in any way impeded [petitioners'] ability to talk to Rea." Pet. App. 8a. The court further noted that "there is no allegation, evidence, or finding that Rea ever did refuse to talk to [petitioners] or their counsel; rather, there is only the allegation that he refused to do so unless government counsel was also present. There is nothing improper about this." *Ibid.* The court concluded that "[n]o right of a defendant is violated when a potential witness freely chooses not to talk," *ibid.*, and thus petitioners were not entitled to the discovery deposition they sought.

The court of appeals also criticized the district court's deposition order on procedural grounds. The district court had ordered the deposition taken ex parte and then sealed. The court of appeals concluded, however, that "[s]uch a procedure is not only wholly unauthorized, it is contrary to the most basic presuppositions of our adversary system of litigation." Pet. App. 9a.[6]

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[6] The court of appeals rejected petitioners' contention that the government's alleged prodding of Rea to breach the attorney-client privilege justified the district court's deposition order. The appropriate means of addressing that allegation, the court noted, is through an evidentiary hearing on petitioners' pretrial motion to dismiss the indictment or to suppress evidence. At that hearing, the court of appeals stated, petitioners would have the right to compel Rea's appearance and have him testify. See *United States* v. *Fortna*, 796 F.2d 724 (5th Cir. 1986). The court found that "[t]here is no indication, allegation, or finding that Rea would be unavailable for such a hearing." Pet. App. 10a.

The court of appeals also rejected petitioners' argument that the district court's deposition order was necessary in order to preserve petitioners' claims of attorney-client privi-

Finally, the court of appeals held that the district court's deposition order was properly reviewable on a petition for a writ of mandamus. It recognized the general rule that "discovery and similar pretrial orders, even erroneous ones, are not reviewable on mandamus, particularly in a criminal case." Pet. App. 11a. The writ is available, however, "where, as here, the applicant has no other means of redress, * * * the circumstances are exceptional, and the applicant establishes 'a clear and indisputable abuse of discretion or usurpation of judicial power by the trial court.'" *Ibid.* (quoting *In re First South Savings Ass'n*, 820 F.2d 700, 705-707 (5th Cir. 1987)).

On the record presented, the court of appeals held that review on mandamus was appropriate. The district court's deposition order, the court held, was "wholly unauthorized * * * entirely unprecedented and constitutes a clear and very substantial departure from the fundamental principles governing criminal pretrial and trial procedures in federal court." Pet. App. 12a. The court of appeals further concluded that the district court's order was

> so plainly and substantially in excess of its authority, and so significantly contrary to the established rules and precedents governing depositions in criminal cases, as to constitute a clear and indisputable abuse of its more general discretion to control the incidents of trial and pretrial in cases before it. * * *

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lege that would be waived if petitioners called Rea to testify at a pretrial evidentiary hearing. The court of appeals remarked that "[w]e are aware of no authority that would support such a waiver, and neither the district court nor [petitioners] (here or below) have cited any authority which assertedly supports it." Pet. App. 10a.

Ibid. The court then found that there was "no available remedy other than mandamus" to correct the district court's erroneous order. *Ibid.* The court of appeals therefore held that this case was "that most rare and exceptional case where relief by mandamus is appropriate respecting a criminal case deposition order." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 5-7) that the court of appeals exceeded its authority by reviewing the district court's interlocutory discovery order on a petition for a writ of mandamus. This Court has long held that "[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); see, *e.g.*, *Mallard* v. *United States District Court*, 109 S. Ct. 1814, 1822 (1989); *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976); *Will* v. *United States*, 389 U.S. 90, 95 (1967). Furthermore, "[t]o ensure that mandamus remains an extraordinary remedy," this Court has consistently maintained that applicants "must show that they lack adequate alternative means to obtain the relief they seek, * * * and carry the burden of showing that [their] right to issuance of the writ is clear and indisputable." *Mallard*, 109 S. Ct. at 1822 (brackets in original).

The court of appeals correctly concluded that the government satisfied its burden for obtaining mandamus relief. First, as the court of appeals recog-

nized, Pet. App. 12a, the government had no other means to prevent Rea, a cooperating witness, from being subjected to a sealed ex parte deposition. The deposition order foreclosed the government's participation in an unauthorized discovery process and thus threatened to injure the government's own legal rights as a party—an otherwise unreviewable pretrial matter. Cf. *United States* v. *Carrigan*, 804 F.2d 599, 601 n.1 (10th Cir. 1986). Second, the government established that the district court's order was clearly beyond that court's lawful jurisdiction. As the court of appeals concluded, the district court's approval of petitioners' request for a one-sided deposition was "wholly unauthorized" and constituted "a clear and very substantial departure from the fundamental principles governing criminal pretrial and trial procedures in federal court." Pet. App. 12a. Those are precisely the circumstances that call for the issuance of the extraordinary writ of mandamus.

2. Nevertheless, petitioners dispute the court of appeals' treatment of the district court's deposition order and renew their contention (Pet. 7-11) that Rules 15 and 16 of the Federal Rules of Criminal Procedure authorize that order in this case. Rule 15(a) generally authorizes the taking of depositions in criminal cases "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial * * *." The court of appeals, in accord with other circuits, see note 5, *supra*, recognized that Rule 15(a) "does not authorize depositions for discovery purposes." Pet. App. 6a. But that was precisely the purpose of the district court's deposition order—to "compel[] [Rea] to testify under oath without the government

present for the limited purpose of discovery." *Id.* at 15a.[7]

The record makes clear that petitioners had not sought to take Rea's deposition in order to preserve his testimony for use at either the trial or pretrial hearings. As the court of appeals found, "there was no claim, evidence, or finding that Rea might be unavailable to testify at trial or at any pretrial hearing." *Id.* at 7a. And petitioners now concede that they sought Rea's deposition in order either to support their previously filed motion to dismiss the indictment or to "develop an 'advice of counsel' defense." Pet. 4-5. Those purposes are plainly beyond the scope of Rule 15(a).

Rule 16 of the Federal Rules of Criminal Procedure imposes discovery and inspection obligations on parties in criminal cases. That rule generally calls for production or inspection of photographs, written or recorded statements, recorded grand jury testimony, a defendant's criminal record, documents and other tangible objects material to the preparation of the defense, and reports of physical or mental examinations and scientific tests or experiments. See Fed. R. Crim. P. 16(a)(1) and (b)(1). Rule 16 does not refer to depositions, and it does not even authorize discovery of statements of third-party prospective government witnesses (apart from certain exceptions not pertinent to this case, see Fed. R. Crim. P. 16(a)(2)). Accordingly, Rule 16 "cannot [be] read

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[7] In their original motion to take the sealed ex parte deposition, petitioners candidly stated that "[t]he defense wants to question Rea alone immediately regarding (1) his relationship with [petitioners], (2) what he told the government about them and (3) all matters pertinent to this case." Pet. App. 69a.

* * * as providing a basis for the trial court to order the depositions of adverse witnesses in criminal prosecutions." *United States* v. *Carrigan*, 804 F.2d at 603.

Since the Federal Rules of Criminal Procedure do not authorize the district court's unprecedented deposition order, and "[t]here is no general constitutional right to discovery in a criminal case," *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977), the only available source of authority would be the court's inherent supervisory powers. See *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). As this Court has stated, "[t]he purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights * * *; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury * * *; and finally, as a remedy designed to deter illegal conduct * * *." *Ibid.* The district court's deposition order served none of these purposes.

Petitioners suggest (Pet. 8) that a sealed ex parte deposition would serve the salutary purpose of allowing them to investigate their claim that Rea, at the government's behest, violated the attorney-client privilege, without forcing the defense to reveal trial strategy. That goal, however desirable to the defense, does not warrant the exercise of supervisory powers to sanction an unauthorized discovery procedure. The decision whether to speak with petitioners rests with Rea, not with petitioners. A prospective witness may legitimately refuse to be interviewed for trial preparation by either the defense or the government. Consequently, a district court has no authority to compel an interview against the witness's wishes. See, *e.g.*,

United States v. *Pinto*, 755 F.2d 150, 152 (10th Cir. 1985); *United States* v. *Fischel*, 686 F.2d 1082, 1091 (5th Cir. 1982); *Kines* v. *Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), cert. denied, 456 U.S. 980 (1982); *Byrnes* v. *United States*, 327 F.2d 825, 832 (9th Cir.), cert. denied, 377 U.S. 970 (1964). Furthermore, as the court of appeals determined, Pet. App. 8a, when Rea agreed to be interviewed by petitioners' counsel only if the prosecutor were present, he acted without any undue influence by a government representative. In that situation, the district court may not compromise Rea's independent decision in order to aid petitioners' gathering of discovery materials. The court of appeals therefore properly issued the writ of mandamus in order to prevent the district court from exercising power beyond its lawful jurisdiction.[8]

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[8] Petitioners err in contending (Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Carrigan*, 804 F.2d 599 (10th Cir. 1986). In *Carrigan*, the Tenth Circuit refused to vacate the district court's order for the discovery deposition of two government witnesses where the record supported that court's factual finding that the government had interfered with the witnesses' freedom to talk with defense counsel. *Id.* at 604. This case, however, is readily distinguishable since "there is no allegation, no finding, and no evidence that the government in any way impeded [petitioners'] ability to talk to Rea." Pet. App. 8a. The court of appeals further noted that "there is no allegation, evidence, or finding that Rea ever did refuse to talk to [petitioners]; rather, there is only the allegation that he refused to do so unless government counsel was also present. There is nothing improper about this." *Ibid.* The court of appeals thus properly concluded that "[n]o right of a defendant is violated when a potential witness freely chooses not to talk." *Ibid.* Accordingly, petitioners may not rely on *Carrigan* as support for the discovery deposition they sought, particularly where

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1989

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the deposition ordered in that case, in stark contrast to the procedure approved by the district court here, expressly directed that the deposition be taken "in the presence of [the witnesses'] attorney and the government's counsel." 804 F.2d at 601.

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